Md Zubir bin Hamid & Ors (as beneficiaries of the estate of Hj Saud bin Hj Deris and Muhammad Salleh bin Hj Deris, deceased) v Zahari bin Salleh & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO K-02(NCVC)(W)-1823–10 OF 2016
HAMID SULTAN, ABANG ISKANDAR AND VERNON ONG JJCA
11 MAY 2017

Land Law — Sale of land — Administrator — Appellants and first respondent were beneficiaries of estate of deceased — First respondent obtained ex parte order of court to appoint himself as sole administrator of deceased's estate — First respondent sold deceased's land to second, third and fourth respondents — Whether failure of respondents to obtain leave of court to sell estate of deceased pursuant to s 60(4) of the Probate and Administration Act 1959 rendered sale of land null and void — Whether second, third and fourth respondents obtained good title of land

The appellants and the first respondent were the beneficiaries of the estate of one Hj Idris bin Hj Abd Rahman ('the deceased') whereas the second, third and fourth respondents were the current registered owners of a land in Mukim Pangkalan Kundur in Daerah Kota Setar ('the land'). The appellants contended that the first respondent had fraudulently obtained an exparte court order on 20 July 1998 to appoint himself as the sole administrator of the deceased's estate particularly the one involve with the land. Consequently, the appellants filed their claim at the High Court, inter alia, for the following prayers: (a) a declaration that the power of attorney dated 5 October 1998 which was registered in the name of the first respondent vide a High Court order was void and be struck off ('prayer 1'); (b) a declaration that transfer of the land from the first respondent to the second, third and fourth respondents was void and be struck off ('prayer 2'); (c) an order that the land administrator of 'Kota Setar' be given power to execute this order and the land administrator should re-register the land into the name of the original owner ie the deceased ('prayer 3'); (d) an order that the power to administer the estate of the deceased be given back to Hj Saud bin Hj Deris and Mohd Salleh bin Hj Deris (both deceased) ('prayer 4'); (e) an injunction order to prevent the respondents and/or the respondents' agents from conducting any business on the land ('prayer 5'); (f) alternatively and additionally, damages to be assess ('prayer 6'); (g) costs ('prayer 7'); and (h) any other order or relief as the court deems fit and proper ('prayer 8'). The High Court dismissed the claim, hence the present appeal.

Held, allowing the appeal in part with costs:

(1) Obtaining leave of court to sell an estate property is a mandatory requirement under s 60(4) of the Probate and Administration Act 1959 ('the Act'), and that procedure as a matter of practice requires the court to inquire the views of the beneficiaries. Failure of the first respondent to comply with s 60(4) of the Act rendered the sale of the land null and void. The first respondent could not have given good title to the second, third and fourth respondents (see paras 2 & 7(a)).

(2) As the sale and transfer was void, it would follow the appellants would be entitled to prayers 2, 3 and 5 as of right with an order for assessment of damages before the registrar of the High Court. Further, based on the totality of facts and the first appellant's conduct, the court also allowed prayer 1. As for prayer 4, it was now rested upon the beneficiaries to apply for letters of administration according to law. In totality, the court allowed prayers 1, 2, 3, 5 and 7 (see paras 7(b)–9).

[Bahasa Malaysia summary

Perayu-perayu dan responden pertama adalah benefisiari-benefisiari estet seorang yang bernama Hj Idris bin Hj Abd Rahman ('si mati') sementara responden-responden kedua, ketiga dan keempat adalah pemilik berdaftar sekarang tanah di Mukim Pangkalan Kundur dalam Daerah Kota Setar ('tanah'). Perayu-perayu berhujah bahawa responden pertama telah secara menipu memperolehi perintah mahkamah ex parte pada 20 Julai 1998 untuk melantik dirinya sebagai pentadbir tunggal estet si mati terutamanya melibatkan tanah tersebut. Akibatnya, perayu-perayu memfailkan tuntutan mereka di Mahkamah Tinggi, antara lain, bagi permohonan berikutnya: (a) perisytiharan bahawa surat kuasa wakil bertarikh 5 Oktober 1998 yang mana didaftarkan dalam nama responden pertama melalui perintah Mahkamah Tinggi adalah tak sah dan dibatalkan ('permohonan 1'); (b) perisytiharan bahawa pemindahan tanah daripada responden pertama kepada responden kedua, ketiga dan keempat adalah tak sah dan dibatalkan ('permohonan 2'); (c) perintah bahawa pentadbir tanah 'Kota Setar' diberikan kuasa untuk melaksanakan perintah ini dan pentadbir tanah patut mendaftarkan semula tanah tersebut kepada nama pemilik asal iaitu si mati ('permohonan 3'); (d) dan perintah bahawa kuasa untuk mentadbir estet si mati diberikan semula kepada Hj Saud bin Hj Deris dan Mohd Salleh bin Hj Deris (kedua-dua si mati) ('permohonan 4'); (e) perintah injunksi untuk menghalang responden-responden dan/atau ejen responden-responden daripada melakukan apa-apa perniagaan di atas tanah tersebut ('permohonan 5'); (f) secara alternatif dan tambahan, ganti rugi ditaksir ('permohonan 6'); (g) kos ('permohonan 7'); dan (h) apa-apa perintah lain atau relif seperti yang mahkamah anggap wajar dan betul ('permohonan 8'). Mahkamah Tinggi menolak tuntutan tersebut, maka rayuan ini.

Diputuskan, membenarkan sebahagian rayuan dengan kos:

(1) Dengan memperolehi izin mahkamah untuk menjual hartanah estet adalah keperluan mandatori di bawah s 60(4) Akta Probet dan Pentadbiran 1959 ('Akta'), dan bahawa prosedur sebagai perkara amalan memerlukan mahakmah untuk menyiasat pandangan benefisiari-benefiasiari. Kegagalan responden pertama untuk mematuhi s 60(4) Akta menyebabkan jualan tanah adalah batal dan tak sah. Responden pertama tidak memberikan hakmilik baik kepada responden kedua, ketiga dan keempat (lihat perenggan 2 & 7(a)).

(2) Memandangkan jualan dan pemindahan adalah tak sah, oleh itu perayu-perayu berhak kepada permohonan 2, 3 dan 5 sebagai hak dengan perintah untuk penilaian ganti rugi di hadapan pendaftar Mahkamah Tinggi. Selanjutnya, berdasarkan keseluruhan fakta dan tingkah laku perayu pertama, mahkamah juga membenarkan permohonan 1. Bagi permohonan 4, ia adalah terletak ke atas benefisiari-benefisiari untuk memohon bagi surat pentadbiran mengikut undang-undang. Secara keseluruhannya, mahkamah membenarkan permohonan-permohonan 1, 2, 3, 5 dan 7 (lihat perenggan 7(b)–9).]

Notes

For cases on administrator, see 8(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 4925–4939.

Cases referred to

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393, FC (refd)

Dato' Tan Chin Woh v Dato' Yalumallai @ M Ramalingam s/o V Muthusamy [2016] 5 MLJ 590; [2016] 8 CLJ 293, FC (refd)

Elitprop Sdn Bhd v Yeo Ping Tieng & Ors and another appeal [2017] 2 MLJ 572, FC (refd)

Heritage Grand Vacation Club Bhd v Pacific Fantasy Vacation Sdn Bhd [2016] 4 MLJ 389; [2016] 7 CLJ 679, CA (refd)

Kamarulzaman bin Omar & Ors v Yakub bin Husin & Ors [2014] 2 MLJ 768, FC (refd)

Samuel Naik Siang Ting v Public Bank Bhd [2015] 6 MLJ 1, FC (refd)

Shearn Delamore & Co v Sadacharamani a/l Govindasamy [2017] 1 MLJ 486; [2016] 6 AMR 797; [2017] 2 CLJ 665, CA (refd)

Tan Ying Hong v Tan Sian San & Ors [2010] 2 MLJ 1, FC (refd)

Yew Wan Leong v Lai Kok Chye [1990] 2 MLJ 152, SC (refd)

Legislation referred to

Probate and Administration Act 1959 s 60(4)

Appeal from: Civil Suit No 22NCVC-76–10 of 2015 (High Court, Alor Setar)

Abdul Hadi bin Ahmad (Abdul Hadi Ahmad & Assoc) for the appellants.
Nursyahana bt Ismail (Jennifer Mei Fen with her) (Syahana & Ong) for the second, third and fourth respondents.

Hamid Sultan JCA (delivering judgment of the court):

[1] The appellants, beneficiaries of the deceased estate appeal against the decision of the High Court which had dismissed their claim, inter alia, for the following prayers namely:

(1) Satu deklarasi bahawa Surat Kuasa Wakil yang didaftarkan kepada nama Defendan Pertama melalui Perintah Mahkamah Tinggi Alor Setar bertarikh 05-10-1998 No Saman Pemula 24-878-98 adalah tidak sah dan dibatalkan.

(2) Satu deklarasi bahawa pindahmilik hartanah yang terkandung di dalam No hakmilik GRN36264 Lot 1414, Mukim Pengkalan Kundor, Daerah Kota Setar,Kedah (dahulu dikenali sebagai SP23788, Lot 1414, Mukim Pengkalan Kundor, Daerah Kota Setar, Kedah) dari Defendan Pertama kepada Defendan Kedua, Defendan Ketiga dan Defendan Keempat melalui No perserahan 17815/1999, 17816/1999 dan 17817/1999 adalah tidak sah dan dibatalkan.

(3) Satu Perintah bahawa Pentadbiran Tanah Kota Setar dan/atau yang berkenaan diberi kuasa untuk menguatkuasakan Perintah ini dan hendaklah mendaftarkan semula hak hakmilik hartanah yang terkandung di dalam No hakmilik GRN36264 Lot 1414, Mukim Pengkalan Kundor, Daerah Kota Setar, Kedah (dahulu dikenali sebagai SP23788, Lot 1414, Mukim Pengkalan Kundor, Daerah Kota Setar, Kedah) kepada nama pemilik asal iaitu Haji Idris Bin Haji Abdul Rahman (Simati).

(4) Satu Perintah bahawa Kuasa mentadbir harta Haji Idris Bin Haji Abdul Rahman (Simati) dikembalikan semula kepada Haji Saud Bin Haji Deris (Simati) dan Mohd Salleh Bin Haji Idris (Simati).

(5) Satu Perintah Injunksi untuk menghalang Defendan-Defendan dan/atau ejen-ejen Defendan-Defendan daripada membuat apa-apa sebarang urusniaga di atas hartanah tersebut.

(6) Gantirugi secara alternatif dan tambahan yang akan ditaksirkan kelak.

(7) Kos.

(8) Lain-lain Perintah atau relief yang difikirkan adil dan sesuaimanfaat oleh Mahkamah Yang Mulia ini.

[2] What is glaringly obvious in the instant case is that the first defendant as administrator of the estate had sold the land without the leave of court. Obtaining leave of court to sell an estate property is a mandatory requirement under the Probate and Administration Act 1959 ('the PA 1959'), and that procedure as a matter of practice requires the court to inquire the views of the

beneficiaries. The relevant section is s 60(4) which reads as follows:

> (4) An administrator may not, without the previous permission of the Court —
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> (a) mortgage, charge or transfer by sale, gift, exchange or otherwise any immovable property situate in any State and for the time being vested in him; or
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> (b) lease any such property for a term exceeding five years.

[3] The parties to this action did not bring to the attention of the court the provision of s 60(4) and in consequence the court did not deal with it. It is incumbent upon courts to ensure that the law is not breached whether or not it is the pleaded case of the parties. Pleading rules applies to facts and not when there is a breach of the law (see: (a) *Shearn Delamore & Co v Sadacharamani a/l Govindasamy* [2017] 1 MLJ 486; [2016] 6 AMR 797; [2017] 2 CLJ 665; (b) *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152; (c) *Dato' Tan Chin Woh v Dato' Yalumallai @ M Ramalingam s/o V Muthusamy* [2016] 5 MLJ 590; [2016] 8 CLJ 293; and (d) *Heritage Grand Vacation Club Bhd v Pacific Fantasy Vacation Sdn Bhd* [2016] 4 MLJ 389; [2016] 7 CLJ 679). If any order or transaction is done in breach of the mandatory provision of the law, the order and/or transaction will be a nullity ab initio based on the Federal Court decision of *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393.

[4] On the date of hearing of the appeal, we brought to the attention of the parties to submit on the mandatory provision of the PA 1959 Act and whether there was compliance. Parties have put their further submission and it was clear that the mandatory provision was not complied with.

BRIEF FACTS

[5] The brief facts and the decision as summarised before us is repeated verbatim to save courts time and reads as follows:

> 1. The plaintiffs ('the PP')/the appellants and the first defendant ('D1')/the first respondent are the beneficiaries of the estate of Hj Idris bin Hj Abd Rahman ('DC'). The PP alleged that D1 had fraudulently obtained an ex parte court order dated 20 July 1998 from Alor Setar High Court ('ex order') to appoint himself as the sole administrator of DC's estate particularly the one involve with a land in Mukim Pengkalan Kundur in Daerah Kota Setar ('the land'). D2, D3 and D4 are the current registered owners of the land.
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> 2. The ex order was filed by D1 to substitute the two administrators (the two administrators had passed away) and to appoint D1 as sole administrator

of DC estate. D1 then entered into a sale and purchase agreement dated 25 January 1999 ('SPA') with D4 and the land was transferred to D2, D3 and D4.

3. *The PP claimed that:* in 2015, P1 found that the land had been transferred to D2, D3 and D4. P1 then lodged a police report on 4 September 2015 to protect his interest on the land. The PP demanded D2, D3 and D4 to return the land but D2, D3 and D4 refused to do so.

4. *The PP prayed for:* a declaration that the ex order is void and be revoked. Declaration that the transfer of the land is void and be revoked. Reinstatement of two administrators of the DC estate.

5. D1 did not enter appearance, thus, judgment in default against D1 had been obtained on 17 December 2015.

6. *In defence D2, D3 and D4 stated that:* D4 had paid full purchase price of the land to D1. D4 had no knowledge of what transpired between D1 and PP. D4 was a bona fide purchaser of the land. PP should have filed a challenge to ex order and not to file new suit seeking order for the ex order to be void. PP action was time barred and PP failed to particularise the fraud alleged. PP's right to represent the 155 other beneficiaries was challenged.

7. *High Court:* the plaintiffs' claim is dismissed with costs of RM15,000. Judgment in default against D1 is set aside.

[6] The learned judge's grounds of decision can be summarised as follows:

1. *Whether the ex order is valid.*
The PP claimed that D1 had obtained the ex order by fraud. No other beneficiaries were informed about the ex-order. DW2 (*Utusan Malaysia*'s staff) had testified that there was an advertisement made to the beneficiaries of DC and the beneficiaries of the two administrators made in 29 June 1998 and it was suggested to the PP that D1 had made an attempt to inform the beneficiaries of DC via substitute service. The court found that the advertisement was clearly intended to the beneficiaries and had directed them to contact with D1. This did not amount to fraudulent act by D1 just because other beneficiaries were unaware of the advertisement. There was no reason for this court to declare the ex order to be void.

2. *Whether D1 could sell the land.*
By ex order appointing D1 as sole administrator, D1 was entitled to enter into SPA with D4. D2, D3 and D4 had a good title of the land.

3. *Whether the PP had cause of action to commence this suit.*
There was no evidence before the court that PP were authorised by 155 other beneficiaries to represent them in this action. PW3 was not named in this action despite being named as beneficiaries in the Syariah Court order but this did not prove that others had authorised the same.

A

4. *Whether this action is time barred.*
Since there was no evidence for fraud, this action is time barred and PP reliance on s 22 of the Limitation Act 1953 was misplaced.

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[7] We have read the appeal record and the submission of the parties in detail. After giving much consideration to the submission of the respondents, we take the view that the appeal must be allowed in part only. Our reasons, inter alia, are as follows:

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(a) in the instant case, failure of the first defendant to comply with s 60(4) of the PA 1956 renders the sale of the property null and void. The first defendant could not have given good title to the second, third and fourth defendants. Support for the proposition is found in a number of cases (see *Tan Ying Hong v Tan Sian San & Ors* [2010] 2 MLJ 1; *Kamarulzaman bin Omar & Ors v Yakub bin Husin & Ors* [2014] 2 MLJ 768; *Elitprop Sdn Bhd v Yeo Ping Tieng & Ors and another appeal* [2017] 2 MLJ 572). Quite recently, the Federal Court when dealing with concept of indefeasibility of title in the case of *Samuel Naik Siang Ting v Public Bank Bhd* [2015] 6 MLJ 1 had, inter alia, held:

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E

> (8) Since the subsequent SPA's with the new purchasers were void ab initio and of no effect, it followed that their related transfer forms ('Form 14A') were also void and ineffective to create a registrable transfer. The said Form 14A was thus a void instrument.
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> ...

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> (10) The relevant Form 14A in respect of the transfer of the title to the appellant was a void instrument and therefore the appellant's title and interest in the lot was indisputably defeasible. The appellant was an immediate purchaser of the lot in question from its registered proprietor, MPM. That being the case the appellant clearly could not enjoy the benefit of the proviso to s 340(3) of the NLC. Once the court was satisfied that the transfer of the title to the appellant arose from a void instrument, it automatically followed that they were liable to be set aside.

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(b) as the sale and transfer is void, it will follow the appellants will be entitled to prayers (2), (3) and (5) as of right with an order for assessment of damages before the registrar of the High Court.

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[8] In respect of the other prayers in the statement of claim, namely prayers (1) and (4) we take the view taking into consideration the totality of the facts and the conduct of the first defendant, in the instant case prayer (1) of the statement of claim ought to be allowed. In respect of prayer (4) it is now rest upon the beneficiaries to apply for letters of administration according to law.

I

[9] For reasons stated above, we allow prayers 1, 2, 3, 5 and 7 with costs and order for assessment of damages before the deputy and/or senior assistant registrar of the High Court. We will make appropriate orders as to costs after hearing the parties.

We hereby order so.

Appeal allowed in part with costs.

Reported by Dzulqarnain Ab Fatar